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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

COURTNEY DENNIS, on behalf of herself and all others similarly situated, Plaintiff, vs. RALPH LAUREN CORPORATION, a Delaware Corporation, RALPH LAUREN RETAIL, INC., a Delaware Corporation, and Does 1- 20, inclusive, Defendants.	Case No. 3:16-cv-01056-WQH-BGS **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** Judge: Hon. William Q. Hayes Date: September 26, 2016 NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

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I. INTRODUCTION

Defendants employ a deceptive pricing scheme for the merchandise that they sell at their Polo Ralph Lauren Factory Stores, their outlet stores. The scheme is simple and effective – Defendants advertise a purported former price for the merchandise, then represent the merchandise as being substantially discounted from the purported former price. Thinking they are receiving a bargain "sale" price, Plaintiff, and thousands (if not millions), of consumers around the country purchased Defendants' outlet products. In fact, the former price never existed or never represented the prevailing market price of the goods offered for sale, nor was it the "market" price within the ninety (90) days preceding the offering of the goods for sale at the Polo Factory outlet stores.

Defendants' phantom markdown scheme violates California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq*. ("UCL"), California's False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, *et seq*. ("FAL"), California's Consumers' Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq*. ("CLRA"), the Federal Trade Commission Act, 15 U.S.C. §§ 41, *et seq*. ("FTCA"), and other similar laws.
Accordingly, Plaintiff – who purchased a girl's Polo shirt believing it to be on "SALE" at "40% off" of a purported former price of $74.99 – initiated this matter on behalf of herself and all others who have been victimized by Defendants' pricing scheme, seeking monetary damages and restitution for their losses as well as injunctive relief.

In their Motion to Dismiss the operative First Amended Complaint ("FAC"), Defendants do not dispute that the facts alleged in the FAC, if true, would state a valid claim under the above statutes. Rather, Defendants rely on feigned ignorance, innuendo, and inapposite case law, in an effort to have this Court impose a pleading standard that is far beyond what is required by Rules 8(a) and 9(b). Defendants also attempt to litigate prematurely Plaintiff's ability to assert claims on behalf of victims in other states – an issue best reserved for class certification proceedings. The Court should reject Defendants' efforts, and deny the Motion to Dismiss in its entirety.

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II. FACTUAL AND PROCEDURAL BACKGROUND

In a misguided attempt to deflect the spotlight from their own deceptive conduct, Defendants contend that Plaintiff and her counsel have filed "cookie cutter" sale discount fraud cases through the (implied) use of professional plaintiffs. Defendants ignore the reality of outlet store shopping: that outlets stores are destination shopping trips. Consumers who shop at outlet malls rarely go for one specific store; instead they visit multiple stores and make several purchases. Seeking to capitalize on the outlet store market, dozens of retailers, including Defendants, began manufacturing merchandise that was strictly for sale in the outlet stores, and also pushing out-of-season merchandise from their flagship stores to the outlet stores. Thus, at the time it is sold, such merchandise is for sale only at the outlet stores. The retailers fail to disclose this fact to consumers, however, and instead represent the merchandise as being discounted off of a former price that never existed at the outlet store.

Plaintiff's counsel initiated an investigation into outlet mall pricing strategies in the spring of 2015. Plaintiff's counsel investigated dozens of outlet stores and identified several stores engaged in misleading and illegal sale discounting practices, including Defendants' Polo Factory outlet stores. Counsel reached out to clients and former clients to determine if any had been defrauded by the pricing schemes; thereafter, litigation commenced to right the wrongs perpetrated by these retailers.

A. The Investigation of Defendants' Polo Factory Outlet Stores

Counsel's investigation revealed that the merchandise sold at Defendants' Polo Factory outlet stores is primarily out-of-season or excess merchandise, lesser quality lines of Polo products, or merchandise made for direct distribution solely in the Polo outlet stores. (¶ 18.)[1] Within each Polo Factory outlet store, Defendants' phantom markdown pricing scheme includes: (1) listing the products they sell in the outlet stores at an alleged full retail or "market" price; and then (2) immediately discounting those items at substantial reductions from those prices (resulting in a phantom markdown). (¶¶ 2-3.)

During the course of the investigation, Plaintiff's counsel tracked the pricing on several items at Polo Factory outlet stores. (¶ 17.) The items investigated included, but were not limited to: men's and women's polo-styled shirts (the traditionally accepted meaning of a "polo shirt" – a short sleeve knit shirt, with buttons), children's polo shirts, and men's tee shirts. (¶ 17.) The investigation revealed that none of the items observed during the course of the investigation were offered for sale at their "former" or full retail "market" prices, but were instead continuously discounted at the outlet stores for the duration of the investigation. (¶ 17.) The same practice occurred in at least two of the Polo Factory outlet stores in San Diego County. (¶ 17 (alleging that it "…was a pervasive practice at the Polo Outlet Stores" during the investigation.))

B. Plaintiff's Purchase of a Girl's Polo Shirt at Defendants' Outlet Store

On November 19, 2015, Ms. Dennis went shopping at the Polo Factory outlet store in Carlsbad, California. (¶ 15.) Upon examining a particular girl's Polo shirt, she observed sale signage representing that the shirt was on "SALE" for "40% off." (*Id.*) Believing that she was receiving a significant value by purchasing a polo shirt for $44.99 that had an original or "market" price of $74.99, she decided to purchase the shirt. (¶¶ 15-17.) Consistent with the advertising, Plaintiff's purchase receipt stated that the "Price" was $74.99, with a "Promo Price" of $30.00 off (which is 40% off of $74.99), yielding a sale price of $44.99. (¶ 15; Declaration of Todd D. Carpenter in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss ("Carpenter Decl."), Exh. A.) Plaintiff believed she was receiving a substantial discount on an item of greater value than it actually was, and she was therefore damaged in the amount of discount she did not receive. (¶ 24.)

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[1] Unless otherwise noted, parenthetical paragraph citations – *i.e.*, "(¶ __)" – are to the FAC (Doc. 11), which is the operative complaint in this case.

Plaintiff thereafter responded to counsel's inquiry regarding Defendants' pricing scheme. Counsel's review of Plaintiff's purchase, and the results of Counsel's investigation, confirmed that the represented price ($74.99) of the girl's Polo shirt purchased by Plaintiff was never the prevailing market or former price at the Polo Factory outlet store within the 90 days immediately preceding her purchase. (¶ 15.) Instead, Defendant continuously discounted the shirt, including at $44.99 ("40% off" of the purported $74.99 original price) – the "sale" price at which Plaintiff purchased the shirt. (*Id.*) Plaintiff thereafter brought this class action lawsuit to end, and seek recovery for, Defendants' phantom markdown scheme.

III. ARGUMENT

A. Legal Standards

The purpose of a Rule 12(b)(6) motion to dismiss is to test the legal sufficiency of the complaint, not to decide its factual merits. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001); Fed. R. Civ. P. 12(b)(6). When considering a motion to dismiss, the Court must take as true all factual allegations in the plaintiff's complaint, and draw all reasonable inferences in the plaintiff's favor. *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014).

In their Motion to Dismiss, Defendants do not – and cannot – dispute that the allegations of the FAC, if taken as true, state cognizable claims under the FAL, the UCL, the CLRA, and analogous state laws. Indeed, Defendants themselves cite to a case, *Spann v. J.C. Penney Corp.*, in which the Court recognized the validity of "phantom sale" cases, denied the defendant's motion to dismiss, certified a class, denied the defendant's motion for summary judgment, and then approved a class-wide settlement for $50 million. 314 F.R.D. 312, 317 (C.D. Cal. 2016).

Instead, the Motion to Dismiss is primarily a procedural challenge under Rules 8(a) and 9(b) to the sufficiency of detail provided by Plaintiff in her FAC.

These rules are well known. Rule 8(a)(2) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (alterations and quotation marks omitted). In short, the allegations must "raise a reasonable expectation that discovery will reveal evidence" that supports the plaintiff's claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

Rule 9(b) requires a complaint sounding in fraud to "identify the who, what, when, where, and how of the misconduct charged." *Rosales v. FitFlop USA, LLC*, 882 F. Supp. 2d 1168, 1175 (S.D. Cal. 2012). Additionally, "the plaintiff must plead facts explaining why the statement was false when it was made." *Rosado v. eBay Inc.*, 53 F. Supp. 3d 1256, 1262 (N.D. Cal. 2014). Courts have recognized, however, that a plaintiff need not plead the "who, what, when, where, and how when access to answers for those questions is in Defendants' control. Instead, a plaintiff must plead with particularity how and why he was personally deceived." *Chester v. TJX Cos., Inc.*, No. 15-cv-01437-ODW, 2016 WL 4414768, at *12 (C.D. Cal. Aug. 18, 2016) (internal quotations and citations omitted). Moreover, "Rule 9(b) does not require . . . the pleading of detailed evidentiary matter. All that is necessary is identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations[2]." *Cholakyan v. Mercedes-Benz USA, LLC*, 796 F. Supp. 2d 1220, 1232 (C.D. Cal. 2011) (internal citations and quotations omitted); *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 999 (9th

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[2] Defendants also note that the complaint is an amended complaint, and ask that the Court grant their motion "with prejudice." But the FAC was not in response to any motion to dismiss, and no prior leave to amend has been requested or granted; thus, the Court should grant leave to amend if it grants any part of Defendant's motion. *See, generally, Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) (finding that dismissing "without leave to amend in improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment").

Cir. 2010); *Dorfman v. Nutramax Lab., Inc.*, No. 13-cv-0873-WQH, 2013 WL 5353043, at *12 (S.D. Cal. Jan. 27, 2013) (finding that where plaintiff identified false and misleading statements, scientific studies controverting those statements, and when and where he purchased the product in question, "Rule 9(b) require[][d] no more").

B. The FAC Provides Sufficient Particularity For Defendants To Understand And Defend Against Plaintiff's Claims

Defendants apparently missed entire sentences of the FAC when reviewing it. As explained below, Plaintiff has explained exactly what practice she is challenging, and how and why Defendants' false discounting practices are deceptive. Plaintiff has sufficiently identified which shirt she bought; fully described Defendants' deceptive advertising; and provided any necessary details of counsel's investigation. Accordingly, Defendants' challenge under Rules 8(a) and 9(b) should be rejected.

1. Defendants Have Sufficient Notice Of The Shirt That Plaintiff Purchased.

While Plaintiff's FAC did not include a copy of Plaintiff's receipt, it provided more than enough detail to enable Defendants to identify the shirt that Plaintiff bought. Specifically, Plaintiff alleged: (i) the date of purchase ("[o]n or around November 19, 2015"); (ii) the location where Plaintiff made the purchase (the "Ralph Lauren Polo Factory store" in "Carlsbad, California"); (iii) the item she purchased (a "girl's Polo shirt" that had a "price tag on the shirt" for "$74.99"; and (iv) the advertising related to the shirt ("she observed signs that declared, 'SALE' with the shirt[,]" "advertised at '40% off'"). (¶¶ 15-16.) Plaintiff further alleged that her receipt identified the shirt as allegedly having a price of $74.99, but due to the purported "40% off" "SALE," Plaintiff was able to purchase the shirt at the "Promo Price" of $44.99. (*Id.*) Given all of these facts, Defendants' claim that they have been "unable to match" the FAC's description of the shirt that Plaintiff purchased "to any particular item sold in its Carlsbad outlet during the applicable time period." is simply not credible. (Defs.' Br. at 10:24-11:2.)

Nevertheless, to address Defendants' feigned skepticism that Plaintiff "actually bought" the shirt (*id.* at 6:9-10), Plaintiff is concurrently including a copy of her receipt, which Plaintiff quoted from, referred to, relied on, and hence incorporated into her FAC. (Carpenter Decl., Ex. 1.)[3] The receipt lists, *inter alia*, Defendants' store address, register number, and transaction number; the item number of the shirt; and a bar code that, on information and belief, identifies the receipt itself. This moots Defendants' argument.

2. Defendants Have Sufficient Notice Of The Advertising At Issue.

Defendants contend that the FAC's description of their deceptive advertising is too barebones for them to possibly prepare an Answer. Nonsense. Plaintiff fully quoted the content of the false advertising at issue and alleged the context in which it was seen. She stated that she "observed signs that declared 'SALE' with the shirt [and that it] was advertised at '40% off.'" (¶ 15.) That is what led Plaintiff to believe that the shirt she was considering purchasing was on sale at 40% off of its tagged price of $74.99. Her receipt confirmed the alleged sale price, stating that the shirt's "Price" was "[$]74.99," but due to the alleged "Promo Price ([$]30.00)" discount, the shirt was only $44.99, or 40% off of $74.99. (*Id.*) Try as Defendants might to muddy these waters, the advertising at issue is no more sophisticated than that.

The Northern District of California's recent decision in *Knapp v. Art.com, Inc.*, is instructive. *Knapp v. Art.com, Inc.*, No. 16-cv-00768-WHO, 2016 WL 3268995 (N.D. Cal. June 15, 2016). As here, the plaintiff in *Knapp* alleged that the defendant's representations that prices were "40% off" reasonably caused the plaintiff to believe that the "sale" price was discounted off of a prior price. In finding that the plaintiff had plead a plausible claim under Rule 8, and had satisfied the requirements of Rule 9(b), the court explained that, "[v]iewed in the light most favorable to the nonmoving party, these allegations are sufficient to plausibly establish that Knapp interpreted the '40% off' language as advertising a discount from Art.com's former prices. Indeed, it is not clear how else Knapp could have reasonably understood the "40% language" other than as advertising a discount from Art.com's former prices." *Id.* at *5 (emphasis added).

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[3] As such, it is proper for the Court's consideration. *See, Dunn v. Castro,* 621 F.3d 1196, 1205 n.6 (9th Cir. 2010); *Chester,* 2016 WL 4414768 at *4 (in a "compare at" pricing case, taking judicial notice of photographs as they were "not subject to reasonable dispute and 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.' Fed. R. Evid. 201(b)(2).").

The same is true here. Defendants nevertheless cite to four decisions/orders that they claim support that the FAC's allegations as inadequate. As discussed below, however, the decisions/orders are inapposite, and one case cited by Defendants actually directly supports Plaintiff's case.

First is the decision in *Kearns v. Ford Motor Co.*, 567 F.3d 1120 (9th Cir. 2009). The plaintiff in *Kearns* claimed UCL and CLRA violations in connection with Ford's sale of pre-owned vehicles. *Id.* at 1125. But the claims were dismissed because the plaintiff had not identified "(1) the material statements in the allegedly deceptive advertisements; (2) when he saw the advertisements; (3) which materials he relied on when making his purchasing decision; (4) who told him that certified pre-owned vehicles were 'the best used vehicles available'; or (5) when this alleged statement was made." *Chester*, 2016 WL 4414768 at *12 (analyzing *Kearns*, 567 F.3d at 1126). Here, on the other hand, Plaintiff has alleged the deceptive material statements that she relied upon when she bought the shirt, specifically, a sign in Defendants' store that declared "SALE" and "40% off;" and that but for the sale, the shirt she bought had a tagged price of "$74.99." (¶¶ 15, 19.) Plaintiff has also alleged that these statements about a purported "sale" were material to her purchasing decision. (¶ 23.) *Kearns* is thus inapposite.

Second is an unreported trial court order in *Dyson, Inc. v. Garry Vacuum, LLC, et al.*, Case No. 10-cv-01626-MMM (C.D. Cal. Feb. 4, 2011) ("Appendix of Decision in Support of Defendants' Motion to Dismiss, (Doc. 20-2) ("Defs.' Appendix"), No. 4). *Dyson* involved a dispute between two competing vacuum manufacturers. Garry Vacuum asserted that certain factual claims by Dyson, Inc. about its Dyson vacuum cleaners violated the "literally false" prong of the federal Lanham Act. The court found that many of the allegedly false claims were plead with the specificity required by Rule 9(b), but that because Garry Vacuum failed to provide the context of Dyson's claims, it failed to demonstrate that "literal falsity" was plausible as required under Rule 8. The court thus dismissed the Lanham Act causes of action with leave to amend. (*Id.* at 31-32.) The court also dismissed, with leave to amend, Garry Vacuum's causes of action under the FAL and UCL due to lack of standing, finding that "it is not sufficient for business competitor plaintiffs to allege lost opportunities, lost anticipated profits, or injury to goodwill," and that Garry Vacuum did not place itself in the position of a consumer by purchasing a Dyson vacuum to test for purposes of litigation. (*Id.* at 34-36.) This case, on the other hand, does not involve claims under the "literally false" provision of the Lanham Act, and it is filed by a customer who actually purchased merchandise at Defendants' store in reliance on Defendants' false "sale" pricing. Moreover, Plaintiff has plead the context of Defendants' false advertising by describing the content and location of the sale signage. Accordingly, *Dyson* is also inapposite.

Third is a trial court order in *Rubenstein v. Neiman Marcus Grp., LLC*, No. 14-cv-07155, 2015 WL 1841254 (C.D. Cal. March 2, 2015). *Rubenstein* involved "Compared To" price tags used at Neiman Marcus' "Last Call" outlet stores. The plaintiff argued that the "Compared To" price tags misled consumers into believing that the lower price they were paying was a discount off the price that the Neiman Marcus retail stores had previously charged for the same merchandise. The trial court disagreed, noting that, without more information, the "Compared To" pricing could also indicate a price charged by other retailers. The trial court thus dismissed the complaint with leave to amend. This case, on the other hand, does not involve any "Compared To" pricing, but rather advertising stating that the merchandise being sold was on sale off the tagged former price. *Rubenstein* is thus also inapposite.

Finally, fourth is an unreported trial court order in *Spann v. J.C. Penney Corp.*, No. 12-cv-00215-FMO (C.D. Cal. Feb. 21, 2014). According to Defendants, *Spann* is a case where "[f]ailure to satisfy pleading requirements . . . led to the dismissal of cases like this one alleging false and misleading price and discount advertising." (Defs.' Br. at 12.) However, as discussed, *Spann* is actually extremely favorable to Plaintiff. There, like here, the plaintiff pled that she observed placards with "original" and "sale" prices, and was thus induced to purchase products believing that she was paying "significantly less" than what the products were worth, when indeed the advertising was misleading. *Spann*, 314 F.R.D. at 316. The case not only survived a motion to dismiss, but was certified as a class action, survived a motion for summary judgment, and was settled on a class-wide basis for $50 million.[4] *Id.* at 317.

In sum, the decisions/orders cited by Plaintiff are inapposite or helpful to Plaintiff, and do nothing to change that the FAC specifies in sufficient detail the contents of Defendants' false advertising and also explains why the advertising is false.

All of the information needed for Defendants to investigate and prepare an Answer is in the FAC. Nothing more is needed at this stage.

3. Plaintiff Is Not Required To Plead Her Pre-Filing Investigation.

Defendants' Motion to Dismiss reads more like a discovery request for the details of counsel's investigation than a legal argument about whether Defendants have sufficient notice of Plaintiff's allegations. Defendants consequently ask the Court to apply an inappropriate, non-existent standard under which plaintiffs would be required to plead the process of their counsel's investigations, rather than the facts that support the plaintiffs' claims. No rule of law requires such a pleading, and other than the anomalous

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[4] Defendants presumably cite to *Spann* because the court did dismiss, without prejudice, plaintiff's bare allegations that *after* she filed her complaint, J.C. Penney's continued its false discount pricing scheme. (Defs.' Appendix at 70). Penney's claimed it ceased the allegedly false advertising practice after the lawsuit was filed. (*Id.*) The court dismissed plaintiff's allegations regarding the post-lawsuit period because they were bare and didn't even claim actual violations, but rather merely that Penney's "intend[ed] . . . the commission of the unlawful act." (*Id.*) This order obviously did not affect the viability of plaintiff's claims.

Rael v. Dooney & Bourke, Inc. decision,[5] the cases cited by Defendants do not purport to hold otherwise. Plaintiff has met her pleading requirements under Rule 8 and 9(b), and has alleged all the elements of each of her claims.

In fact, plaintiffs are not necessarily even required to plead that they conducted any pre-suit investigation – let alone explicitly plead the details of such an investigation – and "particularly so where the information is not within the personal knowledge of the pleader." *Stathakos v. Columbia Sportswear Co.,* No. 15-cv-04543, 2016 WL 1730001 at *3-4 (N.D. Cal. May 2, 2016) (finding that the plaintiffs' complaint satisfied Rule 9(b) even though the plaintiffs had not plead a pre-suit investigation) (emphasis added) (citation omitted); *Knapp,* 2016 WL 3268995 at *4 (finding that plaintiff's allegations of a perpetual sale were alone sufficient to meet FAL sections 17500 and 17501, and CLRA sections 1770(a)(9) and (a)(13) pleading requirements); *Le v. Kohl's Dept. Store, Inc.*, No. 15-cv-1171-JPS, 2016 WL 498083, at *1099 (E.D. Wis. Feb. 8, 2016) (denying a motion to dismiss where plaintiff had not conducted a nationwide pre-suit investigation before alleging the defendant's comparison prices did not reflect a price at which its merchandise was routinely sold); *Horosny v. Burlington Coat Factory of CA, LLC*, 15-cv-05005-SJO, ECF No. 30 at p. 3 (C.D. Cal. Oct. 26, 2015) (denying a motion to dismiss where plaintiff plead a deceptive pricing scheme "on information and belief" and not based on a pre-suit investigation) (Carpenter Decl., Exh. B).

Similarly, with regard to the other items in Defendants' store that Plaintiff's counsel's investigation revealed to also be falsely discounted, the 9th Circuit rejects requiring "that a complaint must allege specific [transactions] to specific customers at specific times." *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997); *see Columbia Sportswear*, 2016 WL 1730001 at *3 (finding it sufficient that plaintiffs had only pled the alleged false sale and reference price for one of the several items they purchased and alleged were falsely advertised)

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[5] *Rael v. Dooney & Bourke, Inc.,* No. 16-cv-0371-JM, 2016 WL 3952219 (S.D. Cal. July 22, 2016).

Defendants place great reliance on the *Rael* decision because it was decided against one of Plaintiff's proposed class counsel. *Rael* involved alleged deceptive pricing with respect to Dooney & Bourke handbags. The district court dismissed the complaint, finding that the plaintiff had not identified which specific handbag she had purchased, and had failed to allege "*why* the 'original' price of the purchased handbag, or . . . any other [] product sold at the outlet was false or misleading." 2016 WL 3952219 at *3 (emphasis in original). Here, however, Plaintiff unquestionably provided more than enough information for Defendants to identify the shirt she purchased (and, with this Opposition, she is attaching the receipt with more identifying information). Plaintiff also explained that "Defendant continuously offered the shirt at discounted prices, including at $44.99; '40% off' the price on the product's price tag." (¶ 17.) And she alleged that her counsel's "investigation revealed that the Polo shirt purchased by Plaintiff was not offered at its full retail price within the 90 days prior to her purchasing it within the relevant market." (¶ 18.) Finally, she alleged that, "[b]elieving that she was receiving a significant value by purchasing [the] polo shirt for $44.99 that had an original or 'market' price of $74.99, she decided to purchase the shirt and proceed to the cash register where she did in fact purchase the shirt." (¶ 15.) Thus, Plaintiff clearly has explained *why* the advertising at issue was false and misleading.[6]

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[6] The *Rael* court noted that in formulating her case theory, plaintiff relied on statements on the back of her sales receipt about the outlet store items being "over-runs, discounted, or irregular," indicating that the items were sold nowhere other than the outlet stores. But, the court pointed out, "over-run" and "discounted" items could have originally been sold at full-price retail stores making plaintiff's comparison inadequate. 2016 WL 3952219 at *4. Here, Plaintiff suffers no such alleged shortcoming. Plaintiff's counsel investigated and found "[a]t least several other items remained continuously discounted . . . or were not offered for sale at their market price for any substantial period of time, including both men's and women's Polo shirts, and men's tee shirts." (¶ 17.)

Although there is no requirement that Plaintiff disclose the details of her counsel's investigation, Plaintiff does take issue with Defendants' mischaracterization of Plaintiff's allegations regarding the investigation. Defendants quote Paragraph 17 of the FAC that the investigation took place "for several months preceding and subsequent to Ms. Dennis' purchase," and based on that quoted language spin a theory that the investigation "could have started the day of or the day before Ms. Dennis's purchase, and then continued for 'several months.'" (Defs.' Br. at 15:20-25.) But if Defendants had read that entire paragraph, they would have seen that, in the very next sentence, Plaintiff alleged that her "counsel's investigation revealed that the 'market' price ($74.99) of the girl's Polo shirt Ms. Dennis purchased was never the prevailing market price at the Polo outlet store within the 90 days preceding Ms. Dennis' purchase, nor was the shirt offered for sale at the 'market' price at any time during the investigation at the Polo outlet store." (¶ 17 (emphasis added).) Obviously, Plaintiff's counsel could not know the price for the "90 days preceding Ms. Dennis' purchase" unless the investigation started at least 90 days before her purchase (which it did). Perhaps facts should not stand in the way of a good story, but they absolutely should stand in the way of a meritless Motion to Dismiss.

4. Plaintiff Adequately Plead Claims For Other Items Sold.

Defendants argue that the FAC does not provide adequate notice of the other products purchased by, and corresponding advertisements encountered by, the putative class members. Defendants claim that they need the identity of the specifics items purchased, the specific language on the advertisements, and the specific prices and discounts of the products for all putative class members. But these details are more suitable for discussion at class certification, and the distinctions are immaterial in light of Defendant's uniform scheme of pricing misrepresentations.

The "other products" argument advanced by Defendants typically arises in challenges to a named plaintiff's ability to assert claims on behalf of customers who purchased products different than the named plaintiff. Courts consistently hold that such challenges are better suited for the class certification stage, not the pleading stage. *See* *e.g.*, *Clancy v. The Bromley Tea Company,* 308 F.R.D. 564, 571 (2013) (". . . analyzing the 'sufficient similarity' of the products is not a standing inquiry, but rather an early analysis of the typicality, adequacy, and commonality requirements of Rule 23"); *Koh v. S.C. Johnson & Son, Inc.*, No. C-09-00927-RMW, 2010 WL 94265, at *3 (N.D. Cal. Jan. 6, 2010) (deferring ruling on issues related to products not purchased by plaintiff until the class certification stage).

In any case, a named plaintiff may "assert claims for unnamed class members based on products he or she did not purchase so long as the products and alleged misrepresentations are substantially similar." *Miller v. Ghirardelli Chocolate Co.*, 912 F. Supp. 2d 861, 868-69 (N.D. Cal. 2012). And in cases "[w]here product composition is less important, courts have modified the substantial similarity approach slightly, focusing more on whether the alleged misrepresentations are sufficiently similar across product lines." *Branca v. Nordstrom, Inc.*, No. 14-cv-2062-MMA, 2015 WL 10436858, at *4 (S.D. Cal. Oct. 9, 2015) (citing *Miller*, 912 F. Supp. 2d at 869 (internal quotations omitted)). In *Branca,* the court denied the defendant's motion to dismiss and held that "Plaintiff had standing to sue on behalf of purchasers of other Nordstrom Rack items with 'Compare At' tags because he is challenging the same basic mislabeling practice across products." *Branca,* 2015 WL 10436858, at *5 (internal citations omitted). In so holding, the court highlighted the insignificance of variation of the Nordstrom Rack products at issue:

> Here, Plaintiff does not allege that his claims depend on what type of product a consumer purchased from Nordstrom Rack; it is immaterial for the purposes of his claims whether one purchased a pair of shoes versus a hat, so long as the item bore a "Compare At" tag. His allegations do not relate to the exact prices, percentages of savings listed on the tags, or specific characteristics of the underlying products, which would vary by product. Rather, his claims relate to the consistent format of the tags, *i.e.*, the juxtaposition of two prices, one higher than the other, the term "Compare At" and a percentage, labeled "% Savings." Moreover, all of the products are marketed to the same consumers, Nordstrom Rack shoppers. Thus, the product composition is of little importance and the similarity amongst the

> purported misrepresentations is most important . . ..

Id. (emphasis added).

As in *Branca*, the differences here between items purchased by unnamed consumers in any Polo Factory outlet store are of little importance to Defendants' alleged misrepresentations. Plaintiff's allegations revolve around Defendants' systematic scheme of false pricing, such that the comprehensiveness of Defendants' conduct trumps any varying differences among the items purchased. For instance, Plaintiff alleges that her counsel's investigation revealed that Defendants "continuously discounted" items from their tagged price in violation of the UCL, FAL, and CLRA. (¶¶ 1-6, 15-17, 43, 52.) All Polo Factory outlet customers were exposed to these misleading advertisements, and because Plaintiff is challenging Defendants' misleading pricing practices in each of their retail outlet stores, product variation is insignificant. *See e.g.*, *Chester*, 2016 WL 4414768, at *7 ("To say that Plaintiff Chester only has standing to sue on behalf of others who purchased a Jessica Simpson handbag in a TJ Maxx store—and only a Jessica Simpson handbag—is to make a mockery of the false advertising class action itself and, based on such logic, a clear way to burden an already overburdened judicial system."). Defendants' citation to *Azimpour v. Select Comfort Corp.* falls short. No. 15-cv-04296-DSD, 2016 WL 3248231 (D. Minn. June 13, 2016); (Defs.' Br. at 18:4-7). There the plaintiff plead his investigation "on information and belief" and even then did not provide any facts regarding the other products that were part of the alleged false discounting scheme. *Id.* at *1-3 (adding that had plaintiff pled any facts regarding the alleged scheme—whether from an independent study or otherwise—he would have been in better stead). *Id.* at *3.

In this context, it is folly for Defendants to complain that the other items subject to their pricing scheme must be specifically identified. Defendants sell hundreds of items, and their own deceptive pricing practices are well known to them – yet they claim that they cannot prepare an answer unless a couple more items are identified? This position is simply not credible. *See, generally, Ranger v. T-Mobile USA, Inc.*, No. EDCV 08-1518-

VAP, 2009 WL 416003, at *2-3 (C.D. Cal. Feb. 19, 2009) (stating where plaintiff alleges a broader, misleading scheme, plaintiff need not identify every transaction and every misrepresentation Defendant made to satisfy notice requirements under 9(b)).

C. **Plaintiff Has Standing To Serve As Lead Plaintiff For A Nationwide Class**

In a class action, Article III standing is satisfied if at least one named plaintiff meets the requirements set forth in *Lujan*— "that (1) the plaintiff suffered an injury in fact, i.e., one that is sufficiently concrete and particularized and actual or imminent, not conjectural or hypothetical, (2) the injury is fairly traceable to the challenged conduct, and (3) the injury is likely to be redressed by a favorable decision." *Bates v. United Parcel Serv. Inc.,* 511 F.3d 974, 985 (9th Cir. 2007) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992) (internal quotations omitted). "In determining whether a plaintiff in a proposed class action has standing, the Ninth Circuit's 'law keys on the representative party, not all of the class members, and has done so for many years.'" *Clancy*, 308 F.R.D. at 571 (citations omitted).

Defendant does not, and cannot, dispute that Plaintiff has Article III standing to assert her own claims. Rather, Defendant contests Plaintiff's ability to bring a lawsuit on behalf of unnamed class members who made their purchases in states other than California. Specifically, Defendants claim that because Plaintiff does not allege she purchased products from outlet stores outside of California, she did not suffer injury as a result of Defendants' violation of any other state law, and thus, does not have standing to pursue the nationwide claims. (Defs.' Br. at 21:12-16).

Resolving this issue at the pleading stage is inappropriate. To apply "the concept of standing to dismiss proposed class action allegations is a categor[][ical] mistake." *Clancy,* 308 F.R.D. at 571. This is because Plaintiff is not seeking to assert claims individually under the laws of any state in which she did not make a purchase. Instead, Plaintiff asserts claims "individually under the laws of California and on behalf of all other persons who have purchased merchandise in states having similar laws regarding consumer fraud and deceptive trade practices." (¶ 6.) As a court explained, "Whether the named plaintiffs have standing to bring suit under each of the state laws alleged is 'immaterial' because they are not bringing those claims on their own behalf, but are only seeking to represent other, similarly situated consumers in those states." *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, 701 F. Supp. 2d 356, 377 (E.D.N.Y. 2010) (emphasis added).

Because Plaintiff seeks to serve in a representative capacity for individuals who have been similarly injured by Defendants' false pricing practices, the next questions concerning choice-of-law, typicality of class members' claims, and adequacy of Plaintiff to represent putative class members are all the "proper subjects of a motion [for class certification] made pursuant to Rule 23," not a motion to dismiss. *Murillo*, 2016 WL 3579671, at *11. Indeed, courts have consistently declined to dismiss multistate claims at the pleadings stage. *See e.g., Czuchaj v. Conair Corp.*, No. 13-cv-1901, 2014 WL 1666427 (S.D. Cal. April 17, 2014) (denying motion to dismiss nationwide class allegations and holding that a choice-of-law determination is premature at the pleading stage); *Clancy,* 308 F.R.D. at 572 ("Such a detailed choice-of-law analysis is not appropriate at this stage of the litigation. Rather, such a fact-heavy inquiry should occur during the class certification stage after discovery"); *In re Clorox Consumer Litig.*, 894 F. Supp. 2d 1224, 1236-37 (N.D. Cal. 2012) (denying pre-discovery motion to strike nationwide class claims, finding that conducting a choice-of-law analysis would be premature).

Plaintiff has plainly and plausibly plead her multistate claims on behalf of affected customers in other states based on similar consumer protection laws in those states. (¶¶ 67-79.) Since this is all that is required of Plaintiff at this stage, Defendants' motion to dismiss Plaintiff's nationwide claims should be denied.

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D. Plaintiff Has Adequately Alleged That Defendants Violated Numerous Laws

Defendants' phantom sale practice violates numerous laws. Defendants focus the bulk of their attention on the adequacy of Plaintiff's False Advertising Law violation allegations (Business & Professions Code § 17500), particularly the adequacy of Plaintiff's investigation of the shirt's market price within the three months immediately preceding its purchase. (*E.g.*, Defs.' Br. at 14:13-17:21.) Defendants mount no serious arguments about how Plaintiff failed to meet the pleading requirements of the other stand-alone statutes Defendants violated. Nevertheless, each is discussed in turn below.

1. Plaintiff Sufficiently Plead That Defendants' False Sales Violate FAL.

Defendants' false markdown pricing violates California's False Advertising Laws. Bus. & Prof. Code § 17500. In California, it is "unlawful for a business to disseminate any statement which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." *Id.* "Even a perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under this section." *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1162 (9th Cir. 2012) (internal citations omitted). In advertising prices, "the worth or value of any advertised thing is the prevailing market price . . . at the time of publication of such advertisement in the locality wherein the advertisement is published." Bus. & Prof. Code § 17501. If a former price is in the advertisement, "[n]o price shall be advertised as a former price . . . unless the alleged former price was the prevailing market price…within three months next immediately preceding the publication of the advertisement." *Id.* Finally, in a class action case, the putative class representative need only plead and prove her individual, actual reliance on the misleading representations. Bus. & Prof. Code §§ 17204, 17535; *Kwikset Corp. v. Sup. Ct.*, 51 Cal. 4th 310, 326 (2011) (finding UCL and

FAL standing where purchasers of goods falsely labeled "made in the U.S.A." alleged that they would not have bought the goods but for the label).

Defendants' pricing scheme was false and deceptive because it gave consumers the false impression that the products were (i) regularly worth more than they were; and (ii) that they were regularly sold for a substantially higher price than they were in fact sold for. Plaintiff adequately plead that Defendants violated the FAL in two respects. First, the price tag on the shirt priced the shirt at $74.99, indicating that $74.99 was its value. Bus. & Prof. Code § 17501 (the "value of any thing advertised is the prevailing market price . . . at the time of publication"). Second, Defendants advertised a false former price. *Id.* ("no price shall be advertised as a former price . . . unless the alleged former price was the prevailing market price . . . within three months next immediately preceding the publication of the advertisement"). Defendants used $74.99 as the benchmark, the former price, from which the 40% off discount was to be taken. However, $74.99 was not the former price because, as counsel's investigation revealed, it was not sold for that "within three months next immediately preceding the publication of the advertisement." Finally, Plaintiff pleads that she relied on these misleading representations and would not have purchased the shirt but for the bargain that she was led to believe she was receiving. (¶¶ 23-24.)

2. Plaintiff Sufficiently Plead That Defendants' False Sales Violate CLRA.

The CLRA prohibits a wide range of practices in connection with the sale or lease of goods or services to consumers, and provides consumers a stand-alone basis for relief. Civ. Code § 1770; *Hinojos*, 718 F.3d at 1107. As relevant here, Plaintiff has alleged that Defendants' actions violate subsection (a)(9) "advertising goods or services with intent not to sell them as advertised," and also subsection (a)(13) "making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions." (Emphasis added.) (¶ 63.) The California Legislature intended the CLRA to be "liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." Civ. Code § 1760.

Here, Plaintiff states at the outset of her FAC that she was at Defendants' outlet store shopping for clothing and related apparel for herself and her family. (¶ 15.) She states that Defendants had sale signs advertising a substantial discount at 40% off tagged prices, including for the shirt that she ultimately purchased. (*Id.*) She adequately pleads that Defendants violated subsection (a)(13) in that: (i) her shirt was not on sale (making the "SALE" sign a false statement about the existence of a price reduction); and (ii) the tagged price of $74.99 was an inflated price used to mislead her into thinking that by paying $44.99 for the shirt, she was purchasing it at a reduced price (making "40% off" a false statement about the amount of the price reduction). (¶¶ 19, 23-25.) In sum, no sale in fact existed, and the amount of the price reduction was in fact $0. Finally, with regard to subsection (a)(9), Defendants were not offering to sell the shirts as advertised, *i.e.*, on sale at 40% off of the non-sale price of $74.99, making that a stand-alone violation of Civil Code § 1770(a)(9).

3. Plaintiff Sufficiently Plead That Defendants' False Sales Violate UCL.

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, or misleading advertising." Bus. & Prof. Code § 17200. Defendants' Motion to Dismiss makes no serious challenge to the adequacy of Plaintiff's UCL allegations. Nevertheless, Plaintiff explains below that she has adequately plead the necessary elements under each prong of the UCL and consequently, Defendants have sufficient notice of these independently viable claims.

a) **Unlawful:** Under the unlawful prong of the UCL, a practice is "unlawful" when the practice violates other state or federal laws. Any violation under this prong is independently actionable under the UCL. *Kearns*, 567 F.3d at 1127 (recognizing that "[e]ach prong of the UCL is a separate and distinct theory of liability") (citation omitted). Plaintiff alleges that Defendants' false markdown practice violates multiple other laws. As discussed above, the practice violates the FAL. *Chester*, 2016 WL 4414768 at *9 (holding that "The UCL expressly incorporates the FAL's prohibition on unfair advertising as one form of unfair competition"). "Accordingly, any violation of the FAL also violates the UCL." *Id.* (citing *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008)) (additional internal citations omitted). Also, as discussed above, the practice violates Civil Code sections 1770(a)(9) and (13).[7]

b) **Unfair:** Under this prong of the UCL, a practice is "unfair" where it causes substantial consumer injury that outweighs any countervailing benefit, and the consumer cannot reasonably avoid injury. *See, e.g., Davis v. Ford Motor Credit Co.,* 179 Cal. App. 4th 581 (Cal. Ct. App. 2009); *Camacho v. Automobile Club of So. Calif.*, 142 Cal. App. 4th 1394 (Cal. Ct. App. 2006). Here, Plaintiff has pled that Defendants' false sales substantially injured consumers by inducing them to buy products that they would not have otherwise purchased. (¶¶ 4, 19, 24.) Plaintiff is aware of no countervailing benefit of the scheme (other than to Defendants), and the scheme cannot be avoided because only Defendants are aware of their products' true pricing structure.

c) **Fraudulent:** Finally, under this prong of the UCL, a practice is "fraudulent" if it is likely to deceive reasonable consumers; even a true statement can fall under this prong if it is either actually misleading, or has a capacity, likelihood, or tendency to deceive or confuse the public. *See, e.g., Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002). When a fraudulent practice is one that a reasonable consumer would attach importance to when deciding whether to enter a transaction, it is "material," and the court can assume that consumers relied on the representation. *See, e.g., In re Tobacco II Cases*, 46 Cal. 4th 298 (2009); *Rice v. Fox Broad. Co.*, 330 F.3d 1170 (9th Cir. 2003).

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[7] The phantom sales also violate FTCA guidelines (15 U.S.C. §§ 45(a)(1), 52(a)) and implementing regulations, specifically the prohibition against advertising a former price "for the purpose of establishing a fictitious [] price on which a deceptive comparison might be based." 16 C.F.R. § 233.1; (¶ 48). These violations demonstrate another manner in which Defendants' false pricing scheme is deceptive.

Here, Plaintiff attached importance to the purported non-sale price of $74.99. (¶ 23.) It led her to believe that the offer to purchase the shirt for $44.99 was a special sale price, *a bargain*, and that if she bought the shirt for $44.99, she was getting the benefit of a shirt with a market value of $74.99. (¶ 15.) Indeed, Plaintiff has stated that she would not have purchased the shirt but for her reliance on the perceived "bargain." (¶ 23.)

Hence, Plaintiff has adequately plead that Defendants' practices violated each prong of the UCL.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' motion to dismiss.

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